



Flemington &
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Community Legal
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Review of the General Insurance Code of Practice

**Joint Submission to the Insurance Council of Australia
on its Review of the General Insurance Code of Practice**

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Table of Contents

Table of Contents	2
Table of Abbreviations.....	2
1. Executive Summary and Recommendations.....	3
1.1. Recommendations.....	3
2. Background	3
2.1. About FKCLC	3
2.2. About PILCH.....	4
3. Application of the Code	4
3.1. Service Delivery.....	4
3.2. Impecunious Clients	4
3.3. Relevance of the Code to our Clients	5
3.4. Public Confidence and Third Parties	5
4. Submissions for Reform	6
4.1. Wider Application of the Code to Third parties	6
4.2. Waiver Option in the Code	6
4.3. Fair and Considerate Treatment.....	7
4.4. Provision of Information	8
5. Conclusion.....	9
Appendix	10
Clauses of the Code principally referred to in this submission	10

Table of Abbreviations

ACCC	<i>Australian Competition and Consumer Commission</i>
ASIC	<i>Australian Securities and Investment Commission</i>
CLC	<i>Community Legal Centre</i>
Code	<i>General Insurance Code of Practice</i>
FKCLC	<i>Flemington & Kensington Community Legal Centre</i>
FOS	<i>Financial Ombudsman Service</i>
Guidelines	<i>ACCC and ASIC Debt Collection Guidelines: for Collectors and Creditors</i>
JDRA	<i>Judgement Debt Recovery Act 1984 (Vic)</i>
PILCH	<i>Public Interest Law Clearing House</i>
Review	<i>Review of the General Insurance Code of Practice</i>
TOR	<i>Terms of Reference</i>

1. Executive Summary and Recommendations

The Flemington & Kensington Community Legal Centre and the Public Interest Law Clearing House (Victoria) welcome the opportunity to submit to the Insurance Council Review of the General Insurance Code of Practice.

This submission responds to the second of the Review Terms of Reference: as to whether Code improves consumer confidence in the general insurance industry.

1.1. Recommendations

FKCLC and PILCH make the following recommendations to the Review Secretariat:

Recommendation 1: *The Code should be reviewed to expand the provisions applicable to or enforceable by, third parties, including, potentially, clauses 3 and 6.*

Recommendation 2: *Clause 3.11 of the Code should be expanded to include Centrelink status, low income and homelessness as further examples of when repayment terms will be considered.*

Recommendation 3: *A specific Code provision should be introduced requiring that debt waiver be considered where it would be unreasonable to require payment, or the debtor has no realistic capacity to make repayment, whether due to extreme disadvantage, severe financial hardship or no practical capacity to repay a debt.*

Recommendation 4: *Insurers should ensure better training of their advisers and staff and collection agents to ensure adherence to the ACCC and ASIC Debt Collection Guidelines: for Collectors and Creditors.*

Recommendation 5: *The first sentence of clause 3.12 of the Code should be amended to read:*

If we are unable to reach an agreement with the person about the repayment of the debt including an inability to make payment, or about liability or as to quantum of liability, we will provide information to them at an early stage about:

Recommendation 6: *The information to be provided under clause 3.12 should include: “(c) the existence of Victoria Legal Aid and community legal centres for a referral to free legal services”.*

2. Background

2.1. About FKCLC

FKCLC is a Community Legal Centre with relevant expertise to the TOR. We note the following features of its service delivery:

- FKCLC has been operating for more than 25 years, delivering free legal services to individuals and organisations with ties to the Flemington and Kensington area;
- FKCLC legal services include comprehensive legal casework and community legal education and law reform programs;
- FKCLC's demographics are marked by a disproportionately high level of:
 - new Australian arrivals;
 - low income earners;
 - Centrelink recipients;
 - public housing tenants;
 - housing density; and

- individuals from culturally and linguistically diverse backgrounds.

2.2. About PILCH

PILCH is an independent, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. PILCH does this by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

PILCH's objectives include to:

- improve access to justice and the legal system for the marginalised and disadvantaged;
- identify matters of public interest requiring legal assistance;
- seek redress in matters of public interest;
- refer individuals, community groups and not for profit organisations to lawyers in private practice and to others in ancillary or related fields willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

3. Application of the Code

3.1. Service Delivery

In its service delivery the FKCLC frequently acts for uninsured parties in motor vehicle accidents, where one of the other parties has insurance cover. In many instances, our client is responding to action taken by the insurer to recover damages on behalf of its customer. In this case there may be an admission or dispute as to liability. Our clients typically have no present or anticipated financial capacity to settle the damages claimed by the insurer.

Less frequently, our client seeks assistance in recovering loss from an insurer, again, as a third party. In these instances it is our experience that the insurer will mostly refuse our client's claim either in full or part (straightforward claims likely do not come to us). Our client will lack the resources to initiate a court action.

In the case of PILCH, it will receive referral requests for pro bono legal assistance in response to Magistrates' Court complaints issued by insurers. Typically, the client has been unable to negotiate a dispute as to liability, or is simply unable to settle due to financial limitations. PILCH may also be asked to assist in pursuing a claim for damages.

If a matter is at the point of litigation, it is unlikely the CLC will be able to assist, since CLCs in general are not funded to defend or prosecute civil litigation. The same applies to Victoria Legal Aid, which does not undertake motor vehicle property damages litigation. Further, PILCH will not provide a referral where the client admits liability, since there would be no merit in lodging a defence. PILCH might provide assistance where there is legal merit in a defence.

3.2. Impecunious Clients

CLC and PILCH clients will often experience financial hardship, arising, for example, from combinations of low income or no income, and barriers to employment due to social exclusion, child-minding duties, homelessness, disability, immigration status or other reasons.

Frequently our clients will have explained their financial position to the insurer, but report being subjected to aggressive and harassing demands for payment, occasionally over a number of

years and from different debt collectors acting on assignment from the insurer.

It is noted that many people on low income and with limited assets are effectively 'judgement proof' under s 12 of the *Judgement Debt Recovery Act 1984 (Vic)*. Similarly, Centrelink benefits are effectively quarantined from recovery under s 60 of the *Social Security (Administration) Act 1999 (Cth)*.

For insurers, any cause of action will normally be statute barred if not commenced within six years, and where a judgement is obtained, it can only be enforced for a period of 15 years.¹

3.3. Relevance of the Code to our Clients

Having regard to our service delivery in disputed (motor vehicle) insurance matters – see 3.1 and 3.2 above – the great majority of our dealings will become the subject of negotiations with insurers. In these circumstances the Code is the principal document which establishes service standards which the CLC and its client might expect in its contact with the insurer. For this reason, it is important for the Code to be adequately framed and adhered to if it is to meaningfully operate as the general insurance industry's promise to be open, fair and honest.²

It is noted incidentally that CLCs, as legal practices, are also regulated in regards to their ethical and professional service delivery standards.

3.4. Public Confidence and Third Parties

Apart from insurance customers, it is the experience of third parties and their advisers which significantly inform the public perception of insurers. This is analogous to public perception of the debt collection business, where consumer groups and regulatory agencies are responsive to the experiences of third party 'consumers'.

This is evidenced, for example, by the engagement of the Australian Competition and Consumer Commission and Australian Securities and Investments Commission in the governance and monitoring of debt collection.³

Insurance contracts are also subject to regulation in various legislative Acts at both Commonwealth and State level. The *Insurance Contracts Act 1984 (Cth)* for instance contains provisions dealing specifically with the subrogation of an insured's rights against third parties where there is a personal relationship between the third party and the insured.⁴ Although those provisions contain a limited definition of "third party", it is further evidence that the dealings which insurers may have with third parties are an issue of general concern to consumers.

More generally, it must be borne in mind that third parties are potential future customers. The experience of a third party who is seeking to enforce a claim against an insured which has accepted liability will inform their perceptions of the insurance sector and of how they would be dealt with if they were a customer.

In this context, and having regard to the second TOR, we submit there is scope for improvement in the Code as regards third party engagement.

¹ *Limitation of Actions Act 1958 (Vic)*, sections 5(1) and 5(4).

² Press Release for the Review of the General Insurance Code of Practice, taken from www.codeofpracticereview.com.au, accessed 26 June 2009. It is acknowledged that this statement refers to the way the industry deals with customers; however, the Code does also have application to third parties and agents.

³ For example, the joint ACCC and ASIC 2008 debt collection forum (5 September 2008); joint ACCC and ASIC Debt Collection Guidelines: for Collectors and Creditors; legislation such as the *Australian Securities and Investment Commission Act 2001 (Cth)* and the *Trade Practices Act 1974 (Cth)*; and Consumer Action Law Centre fact sheets.

⁴ See Part VIII of the *Insurance Contracts Act 1984 (Cth)*.

4. Submissions for Reform

4.1. Wider Application of the Code to Third parties

It is submitted that the Code is too narrow in its application to third parties. In our experience, only clauses 3.10 to 3.12 – the “Financial Hardship (Third Parties Recoveries)” provisions – can be invoked on behalf of third parties.

It is recognised that the Code is principally directed at service provision to insurance customers, and this is reflected by its objectives at clause 1.17. That position is reinforced by use of the words ‘customer’ ‘you’ and ‘your’ throughout the Code, which are defined by reference to insurance holders.

Nonetheless, clause 1.17 (b) of the Code establishes an objective of “improving *consumer* confidence in the general insurance industry” (our emphasis). As described above (3.4), consumer confidence in the industry is directly affected by the experiences of third party debtors or claimants who interact with it.

Case Study 1

The insurer accepted responsibility for an accident, and approved repair of our client’s vehicle. Our client allowed the insurer to use its preferred repairer. Some 5 months later, and after numerous complaints by our client, the straightforward repairs had still not been completed. A complaint was made under the Code as part of a wider complaint to the Financial Ombudsman Service. In particular, it was alleged the insurer failed to handle a “complaint about the quality or timeliness of the work or conduct of the repairer” (clause 3.13 of the Code). The FOS advised that only clauses 3.10 to 3.12 apply to third parties.

Recommendation 1

The Code should be reviewed to expand the provisions applicable to or enforceable by, third parties, including, potentially, clauses 3 and 6.

4.2. Waiver Option in the Code

As noted in section 3.2 above, our clients will frequently experience financial hardship which limits or prevents them from settling a damages claim. They may be ‘judgement proof’. This will be drawn to the insurer’s attention, and in some instances, the insurer will waive a third party debt in these instances. Indeed, we are aware of particular insurers introducing protocols (haphazardly applied) to waive debts in the case of severe or ongoing financial hardship. We support that practice.

Very often, however, claims of financial incapacity are poorly addressed and the client may be subject to demands to make payments which would cause undue financial hardship on the client. The demands can be adverse to a client’s emotional or financial circumstances and are in many cases futile.

We consider that clause 3.10 should specifically itemise additional causes of hardship to trigger repayment options. For example, Centrelink status, low income and homelessness could be included.

Further, we consider that the hardship provisions should provide for more than the extension or postponement of repayments. In particular, the provisions should specify waiver of the debt where there is extreme disadvantage, severe financial hardship or no practical capacity to repay a debt. This might be the case for those with no appreciable assets and who are: long-term

Government benefit recipients; subject to ongoing structural absence from the workforce (for example, carers or single parents on benefits with multiple or young children); refugees prohibited at law from obtaining employment; or other significant incapacity, disadvantage or disability affecting earning capacity.

Case Study 2

Our client admitted liability for an accident. His car was written off and he had pawned any possessions of value in response to his pre-existing financial debts, which remained largely unpaid. He is in receipt of a disability payment due to an acquired brain injury. Additionally, he is experiencing difficulty in securing accommodation, and shares a caravan. Not only are his employment prospects limited, but the pressure of claim recovery is adding pressure to his emotional instability.

Recommendation 2

Clause 3.11 of the Code should be expanded to include Centrelink status, low income and homelessness as further examples of when repayment terms will be considered.

Recommendation 3

A specific Code provision should be introduced requiring that debt waiver be considered where it would be unreasonable to require payment, or the debtor has no realistic capacity to make repayment, whether due to extreme disadvantage, severe financial hardship or no practical capacity to repay a debt.

4.3. Fair and Considerate Treatment

In our experience, insurers loosely and inconsistently apply the requirement at clause 3.10 of the Code to “act fairly and in a considerate manner”. In addition, it is our experience that insurers focus on those particular words, and not the requirement to comply with the details contained in the ACCC and ASIC Debt Collection Guidelines: for Collectors and Creditors (the **Guidelines**).

The Guidelines, for example, state at 16[a] that:

A debtor is entitled to respect and courtesy, and must not be subject to misleading, humiliating or intimidating conduct. Such conduct is likely to breach the Commonwealth consumer protection laws, and may breach other laws as well.

We are also concerned that even where insurers do act appropriately, often this will not be the case with those agents to whom they assign their debts. In this regard, it is noted that many debt collectors are associated with legal practices (and may in fact be solicitors), but act in breach of the *Legal Profession Act (Vic) 2004* or the Guidelines by contacting our clients directly where they know the debtor is represented by a CLC or financial counsellor.

Case Study 3

Our client admitted liability for a motor vehicle accident. It was explained to the insurer that our client was regrettably unable to pay the \$1,990 repairs: she was in receipt of a Centrelink supporting parents’ pension, with two children, no savings or appreciable assets and a car worth less than \$1,000. The insurer continued to make demands for an instalment plan or lump sum payment. Finally, the CLC had responded on seven occasions to increasingly aggressive demands, confirming her position. In a number of these responses, the CLC alerted the insurer to breaches of the Code (being codes 3.10 and 3.12: harassment, failure to refer to financial counsellors or advise of dispute resolution mechanisms). The insurer then contacted the client directly. The matter was referred to the FOS, which found the insurer had

breached the Code.

Case Study 4

The insurer had been in contact with a third party to recover a \$2,500 claim. The third party then attended a CLC, which explained the client's incapacity to pay to the insurer. It appeared this had been accepted by the insurer, and the CLC closed its file. The client returned months later to say they had been contacted by a debt collector on behalf of the insurer in respect of the accident. The collector had called on weekends, late in the evening and in the mornings. It was even suggested to the client that they did not need to contact their lawyer, and the client was pressured into a payment plan they could not pay (which the debt collector alleged the CLC was in agreement with). The CLC brought this to the attention of the insurer. The insurer assessed that the debt collector had acted inappropriately, and agreed there would be no further action taken to recover its loss.

Recommendation 4

Insurers should ensure better training of their advisers and staff and collection agents to ensure adherence to the ACCC and ASIC Debt Collection Guidelines: for Collectors and Creditors.

4.4. Provision of Information

We commend the purpose of clause 3.12 of the Code, but submit it should be strengthened and expanded. Clause 3.12 provides circumstances which will trigger a requirement for the insurer to provide certain information to a third party. These circumstances are where the insurer is "unable to reach an agreement with the person about the repayment of the debt".

Presumably insurers are not required to provide this information at the outset of negotiations with third parties, but it is not clear at what point it might properly be said that the insurer is unable to reach an agreement. In our experiences, insurers hardly ever make the required referrals under 3.12 or provide information about their complaints handling process.

We are also aware that insurers have taken the view that a third party saying they have *no* capacity to make a repayment does not trigger the clause.

Further, a dispute as to liability will not trigger clause 3.12 as it is currently written, nor will a dispute as to quantum, and there is no requirement for referral to free legal services.

Case Study 5

A liable third party had explained to the insurer that they had no capacity to pay. After repeated demands and similar responses by the third party the insurer threatened court action. The third party attended a CLC. An internal complaint was raised on separate grounds, but it was also alleged that the insurer had breached clause 3.12 by not providing information where there had been a disagreement about repayment. The insurer denied it had any obligation under clause 3.12 claiming a refusal to pay is not a disagreement about repayment, notwithstanding the non-payment was for reasons of financial hardship.

Recommendation 5

The first sentence of clause 3.12 of the Code should be amended to read:

If we are unable to reach an agreement with the person about the repayment of the debt, including an inability to make payment, or about liability or as to quantum of liability, we will provide information to them at an early stage about:

Recommendation 6

The information to be provided under clause 3.12 should include:

“(c) the existence of Victoria Legal Aid and community legal centres for a referral to free legal services”.

5. Conclusion

The public's confidence in the insurance industry is informed in part by the experience of third parties which come into contact with it; this is already acknowledged by the third party provisions presently contained in the Code.

We submit there is scope for broadening the application of the Code to third party debtors and claimants. In practice, the Code should provide for better consideration of debtor circumstances including waiver of third party debts in certain circumstances.

Appendix

Clauses of the Code principally referred to in this submission

- 3.10 *We and our Service Providers will comply with the ACCC & ASIC Debt Collection Guideline: for Collectors and Creditors¹², which require us to act fairly and in a considerate manner.*
- 3.11 *If a person is experiencing difficulty repaying a debt due to illness, unemployment or other reasonable cause, and they reasonably expect to be able to discharge the debt if repayment terms are arranged, we will consider one of the following options:*
- a) extending the period of repayment and reducing the amount of each payment due accordingly;*
 - b) postponing payments for an agreed period; or*
 - c) extending the period of repayment and postponing payments for an agreed period.*
- 3.12 *If we are unable to reach an agreement with the person about the repayment of the debt, we will provide information to them about:*
- a) our complaints handling procedures; and*
 - b) the existence of the Australian Financial Counsellors and Credit Reform Association (www.afccra.org) for a referral to a not for profit, free financial counselling service.*